

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 DAVONTAE AMARRI WHEELER,

3 Petitioner,

4 vs.

5 THE EIGHTH JUDICIAL DISTRICT
6 COURT OF THE STATE OF NEVADA,
7 IN AND FOR THE COUNTY OF
8 CLARK, AND THE HONORABLE
9 MICHELLE LEAVITT, DISTRICT
10 JUDGE.

11 Respondent.

Supreme Court Case No.

District Court Case No. 17-328587-3

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Clerk of Supreme Court

12
13 **PETITION FOR WRIT OF MANDAMUS**
14 **OR IN THE ALTERNATIVE PROHIBITION**

15 COMES NOW, Petitioner, DAVONTAE AMARRI WHEELER, by and
16 through his attorney, JAMES J. RUGGEROLI, ESQ., and submits this Petition for
17 Writ of Mandamus or in the alternative Prohibition. This Petition is based on the
18 following memorandum and all papers and pleadings on file herein.

19 DATED this 13th day of September, 2018.

20 Respectfully Submitted,

21 **JAMES J. RUGGEROLI**

22 BY /s/ James J. Ruggeroli
23 James J. Ruggeroli, Esq.
24 Nevada Bar No. 7891
25 400 South 4th Street, Suite 280
26 Las Vegas, Nevada 89101
27 Attorney for Petitioner

1 **I. RELIEF SOUGHT**

2 The State has charged Petitioner, DAVONTAE AMARRI WHEELER, by
3 way of Indictment with COUNT 5 – CONSPIRACY TO COMMIT ROBBERY;
4 COUNT 6 - ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON;
5 COUNT 7 – MURDER WITH USE OF A DEADLY WEAPON. See Petitioner’s
6 Appendix “PA” 0287-0292. Petitioner is requesting that this Court direct the
7 district court to grant Mr. Wheeler’s Petition for Writ of Habeas Corpus and
8 dismiss the Superseding Indictment based on (A) the State’s failure to present
9 exculpatory evidence to the grand jury and based on (B) the insufficient evidence
10 presented to the grand jury which supports the Indictment.
11

12 **II. ROUTING STATEMENT**

13 This petition is presumptively assigned to the Court of Appeals pursuant to
14 NRAP 17(b)(14) because it is a pretrial writ proceeding challenging discovery
15 orders or orders resolving what essentially amounts to a motion in limine.
16

17 **III. ISSUES PRESENTED FOR REVIEW**

18 A. The district court abused its discretion and/or acted in an arbitrary or
19 capricious exercise of discretion by denying Mr. Wheeler’s Petition for Writ of
20 Habeas Corpus because (1) the State failed to present exculpatory evidence to the
21 grand jury, and (2) because insufficient evidence supports the Indictment.
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1 **IV. STATEMENT OF THE CASE / STATEMENT OF THE FACTS**

2 The pertinent facts presented to the grand jury on November 29, 2017 and
3 on April 18, 2018 against Mr. Wheeler are as follows:
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5 1. Gabriel Valenzuela was shot and killed outside of his home on the
6 night of August 9, 2017. Grand Jury Transcript (Nov. 29, 2017 “GJT 1”) PA0102-
7 PA0104.
8

9 2. Approximately 30-40 minutes prior to the shooting, Mr. Wheeler was
10 observed inside the Shortline Express located at 7325 South Jones Boulevard.
11 PA0039-PA0047, PA0130.
12

13 3. While in the convenience store, Mr. Wheeler was captured on
14 surveillance wearing a firearm on his right hip. PA0128-PA0130.
15

16 4. *At least* three other individuals were at the Shortline Express with
17 Wheeler at the time, and the group was seen with a white Mercury Grand Marquis
18 automobile outside the store. PA0043PA0047, PA0049, PA00-PA0114.
19

20 5. The evidence also showed that Mr. Wheeler later claimed to have
21 gotten out of the car shortly after the group left the Shortline Express, and he
22 indicated he had taken a bus home. PA0164:14-17.
23

24 6. Robert Mason, a jogger, later saw a White Grand Marquis and four
25 dark skinned individuals near the Gabriel Valenzuela’s home at 5536 West Dewey
26 Dr., near midnight. PA0063-PA0065, PA0068-PA0069.
27

28 7. However, Mr. Mason could only provide general descriptions of the

1 individuals, and there was no actual identification made of any specific person's
2 identity. Id.

3
4 8. After the shooting, Metro's investigation of the crime scene revealed
5 a "Winchester 45 Auto" shell casing found near Mr. Valenzuela's body. PA0119-
6 PA0120.

7
8 9. However, no "Winchester 45 Auto" head stamp cartridges were
9 found during any of the searches of the residences in this case. Id.

10 10. Evidence presented to the grand jury on April 18, 2018 established
11 that the .45 caliber gun found at Mr. Wheeler's residence (the gun Wheeler had
12 been wearing in the Shortline Express) was not used in the shooting. Grand Jury
13 Transcript (April 18, 2018 "GJT2"), PA0303, PA0309-PA0311.

14
15 11. Mitchell Dosche, a detective with the homicide detail of the Las
16 Vegas Metropolitan Police Department ("Metro") testified that impounded lab item
17 number 14, a Taurus model .45 caliber handgun had been obtained during the
18 course of the investigation pursuant to a search warrant at Mr. Wheeler's residence
19 at Civic Center Drive. PA0309-PA0311.

20
21 12. Anya Lester, forensic scientist in the forensic laboratory in the
22 firearms and tool marks analysis unit for Metro generated a report dated January
23 22, 2018 specifically indicating that item number 14 (the .45 found at Mr.
24 Wheeler's address) fired none of the evidence bullets and cartridge cases.
25
26 PA0303:7-13.
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1 13. That there was *a fifth individual*, the fourth person at the shooting
2 (that was not Wheeler), is supported by evidence in discovery *that the State did not*
3 *present* to the grand jury.
4

5 14. Nikolaus Spahn (the Shortline Express convenient store clerk)
6 testified that he would not sell a Black and Mild cigar to the four individuals in the
7 store because of lack of ID, but another individual that had ID came in the store a
8 few minutes later and bought the same Black and Mild cigar. PA0043-PA0045.
9

10 15. Through investigation, police obtained the identity of the individual,
11 Marcell Solomon, in the store that bought the Black and Mild cigar for the people
12 that had been in the store. See a true and accurate copy of the relevant portion of
13 Mr. Solomon's Voluntary Statement ("Solomon VS") PA0377-PA0394.
14

15 16. Det. Dosche found Mr. Solomon through his credit card purchase and
16 because of the surveillance video from the convenience store. PA0378.
17

18 17. When asked about how many people he had seen in the white car in
19 front of the Shortline Express, Mr. Solomon answered:
20

21 A: I wanna say **five**. I'd say two in the front and three in the back.
22

23 ...

24 Q1: And you believe there was five in the car.

25 A: I believe – I wanna say there was **five of 'em**.
26 PA0380 (Emphasis added).
27
28

1 18. Wheeler had told detectives that there had been four other individuals
2 beside himself that went to the convenience store. See a true and accurate portion
3 of Wheeler’s Voluntary Statement (“Wheeler’s VS”) PA0396-PA0398, PA0399-
4 PA0400.
5

6 19. Strangely, and in violation of law, the State did not provide this
7 evidence to the grand jury.
8

9 For the reasons set forth below, the district court abused its discretion and/or
10 acted in an arbitrary and capricious manner in denying Mr. Wheeler’s Petition for
11 Writ of Habeas Corpus.
12

13 **V. JURISDICTIONAL STATEMENT**

14 “This [C]ourt has original jurisdiction to issue writs of prohibition and
15 mandamus.” Friedman v. Eighth Jud. Dist. Ct., 127 Nev., Adv. Op. 75, 264 P.3d
16 1161, 1169 (2011) (citing Nev. Const. art. 6 s 4). “Writ relief is an extraordinary
17 remedy, and this Court typically exercises its discretion to consider a writ petition
18 only when there is no plain, speedy, and adequate remedy in the ordinary course of
19 law.” Fulbright & Jaworski v. Eighth Jud. Dist. Ct., 131 Nev., Adv. Op. 5, 342
20 P.3d 997, 1001 (2015).
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24 When “the district court acts without or in excess of its jurisdiction, a writ of
25 prohibition may issue to curb the extrajurisdictional act.” Las Vegas Sands Corp.
26 v. Eighth Jud. Dist. Ct., 130 Nev., Adv. Op. 13, 319 P.3 618, 621 (2014) (citing
27 Club Vista Fin. Servs., L.L.C. v. Eighth Jud. Dist. Ct., 128 Nev., Adv. Op. 121,
28

1 276 P.3d 246, 249 (2012). Alternatively, this Court may issue a writ of mandamus
2 to compel the performance of an act which the law requires as a duty resulting
3 from an office, trust, or station or to control a manifest abuse of or arbitrary or
4 capricious exercise of discretion. NRS 34.160; Round Hill Gen. Imp. Dist. V.
5 Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).
6

7
8 Here, the district court has manifestly abused its discretion, and the
9 Petitioner has no alternative remedy. For the reasons set forth below this Court
10 may and should issue a writ of mandamus/prohibition resulting in the dismissal of
11 the Superseding Indictment against Mr. Wheeler.
12

13 **VI. ARGUMENT**

14 A defendant charged with an offense may challenge the probable cause to
15 hold him to answer through a petition for writ of habeas corpus. Gary v. Sheriff,
16 Clark County, 96 Nev. 78, 605 P.2d 212 (1980); Cook v. State, 85 Nev. 692, 462
17 P.2d 523 (1969). NRS 171.206 requires the magistrate to determine if probable
18 cause exists to believe that an offense has been committed and that the defendant
19 has committed it. To establish probable cause to bind a defendant over for trial, the
20 State must show that (1) a crime has been committed, and (2) there is probable
21 cause to believe the defendant committed it. See NRS 171.206.
22

23
24 A suspect may not be bound over for trial unless the state demonstrates that
25 the suspect committed the charged crime. Sheriff, Clark County v. Richardson, 103
26 Nev. 180, 734 P.2d 735 (1987). It is recognized that the finding of probable cause
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1 to support a criminal charge may be based on slight, even marginal, evidence
2 because it does not involve a determination of the guilt or innocence of an accused.

3
4 Sheriff, Clark County v. Richardson, 103 Nev. 180, 734 P.2d 735 (1987).

5 However, finding of probable cause requires far more than a trace of evidence; the
6 facts must be such as would lead a person of ordinary caution and prudence to
7 believe and conscientiously entertain a strong suspicion that the defendant
8 committed the crime in question. See Graves v. Sheriff, 88 Nev. 436, 438, 498
9 P.2d 1324, 1326 (1972). Moreover, a finding of probable cause may not rest on
10 other than “legal evidence,” See Tetrou v. Sheriff, 89 Nev. 166, 169 (1973), and
11 “due process of law requires adherence to the adopted and recognized rules of
12 evidence.” Goldsmith v. Sheriff, 85 Nev. 295, 303 (1969).

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16 Moreover, Nevada law requires a district attorney to inform the grand jurors
17 of the specific elements of any public offense which they may consider as the basis
18 of the indictment. See NRS 172.095(2) (“Before seeking an indictment, or a series
19 of similar indictments, the district attorney shall inform the grand jurors of the
20 specific elements of any public offense which they may consider as the basis of the
21 indictment or indictments.”)

22
23
24 Finally, the State also has a special duty pursuant to NRS 172.145(2): “If the
25 district attorney is aware of any evidence which will explain away the charge, the
26 district attorney shall submit it to the grand jury.” Exculpatory evidence has been
27 defined as that evidence “which has a tendency to explain away the charge against
28

1 the target of the grand jury's investigation." Lane v. District Court, 104 Nev. 427,
2 463, 760 P.2d 1245, 1269 (1988) (Steffen, J., concurring) (citing Sheriff v. Frank,
3 103 Nev. 157 at 160, 734 P.2d 1241 at 1244 (1987)).
4

5 For the reasons set forth below, the Indictment here must be dismissed
6 because: (A) the State violated NRS 172.145(2) by failing to present exculpatory
7 evidence that could have explained away the charges here and (B) insufficient
8 evidence supports the Superseding Indictment.
9

10 **A. THE STATE VIOLATED NRS 172.145(2)**
11

12 The State failed to present known exculpatory evidence to the grand jury in
13 violation of NRS 172.145(2). Evidence that *there was a fifth individual* present at
14 the convenience store is fully supported by independent evidence known to the
15 State, however, the State unjustifiably failed to provide this evidence to the grand
16 jury. This evidence is exculpatory because Mr. Mason testified that there were only
17 four individuals at Mr. Valenzuela's home, and Mr. Wheeler had told police that
18 he had left the four other individuals shortly after leaving the convenience store
19 and prior to any shooting.
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21

22 At the grand jury, Mr. Spahn (the convenient store clerk) testified that he
23 would not sell a Black and Mild cigar to the four individuals *in the store* because
24 of lack of ID, so another individual that had ID came in the store later and bought
25 the same Black and Mild cigar. PA0043-PA0045.
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28 Through investigation, police obtained the identity of Marcell Solomon and

1 questioned him. PA0377-PA0394. Det. Dosche found Mr. Solomon through his
2 credit card purchase and because of the surveillance video from the convenience
3 store. PA0378. When asked about how many people he had seen in the white car
4 in front of the Shortline Express, Mr. Solomon answered:

6 A: I wanna say **five**. I'd say two in the front and three in the back.

8 ...

9 Q1: And you believe there was five in the car.

10 A: I believe – I wanna say there was **five of 'em**.

11 PA0380.

13 Moreover, Mr. Wheeler had told detectives that there had been four other
14 individuals, but the State did not provide this statement to the grand jury. Wheeler
15 told detectives that there were five people beside himself that went to the
16 convenience store. PA0396-PA0398, PA0399-PA0400.

18 Although Mr. Solomon eventually waived in his certainty as to the exact
19 number of individuals, Mr. Solomon unquestionably indicated, in the first instance,
20 that he thought there were five individuals. It was only after the detective
21 continued to press Mr. Solomon did he waiver. Nevertheless, even if he said four
22 individuals were present at certain points of his statement, he undoubtedly
23 indicated that there were five present at the begin and at different points during his
24 statement. This evidence amounts to exculpatory evidence because it corroborated
25 Wheeler's statement to the police that there had been four others present before he
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1 left the car, got on a bus, and did not go with the others to the scene of any
2 shooting.

3
4 Exculpatory evidence has been defined as that evidence "which has a
5 tendency to explain away the charge against the target of the grand jury's
6 investigation." Lane v. District Court, 104 Nev. 427, 463, 760 P.2d 1245, 1269
7 (1988) (Steffen, J., concurring). When a prosecutor has abused NRS 172.145 (2)
8 by withholding known exculpatory evidence and engaging in conduct that impairs
9 the function of an independent and informed grand jury, the courts of this state
10 have not stood silently by. Mayo v. Eighth Jud. Dist. Ct., 384 P.3d 486, 491
11 (2016).
12

13
14 Though not required by the federal constitution or as a matter of the federal
15 courts' supervisory authority, see United States v. Williams, 504 U.S. 36, 51-53,
16 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992), in a number of states and in the District
17 of Columbia, "there are statutes or judicial decisions that require prosecutors to
18 inform the grand jury of exculpatory evidence in some circumstances," 1 Sara Sun
19 Beale et al., *supra*, § 4:17, as do the ABA Standards for Criminal Justice, § 3-4.6(e)
20 (4th ed. 2015).
21

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23
24 In Nevada, a deputy district attorney who failed to submit evidence that had
25 a tendency to explain away the charge against a defendant violated his duty as
26 dictated by the language of NRS 172.145(2). See Sheriff v. Frank, 103 Nev. 157 at
27 160, 734 P.2d 1241 at 1244 (1987)).
28

1 The respondent in Frank, a sexual assault case, argued that the deputy
2 district attorney violated his duty under NRS 172.145(2) by failing to present to
3 the grand jury conclusive proof that the victim made deliberately false accusations
4 of sexual misconduct against other individuals at the same time that she was
5 making similar accusations against her father (the respondent). The Nevada
6 Supreme Court agreed and held that the evidence regarding the victim-daughter's
7 prior false accusations, made at the same time she also accused her father, had a
8 tendency to explain away the charge against the respondent. The Court held that by
9 failing to submit this evidence to the grand jury, the district attorney violated his
10 duty dictated by the plain, unambiguous language of NRS 172.145(2). Frank, 103
11 Nev. at 164-65, 734 P.2d at 1244.

12 In State v. Babayan, 787 P.2d 805, 817 (1990) the district court found that
13 substantial exculpatory evidence was known to the District Attorney's Office, but
14 that the prosecutors failed to present it to the grand jury. The prosecution presented
15 evidence to the grand jury that numerous children were sexually assaulted, either
16 vaginally or anally. The testimony presented indicated that complete penetration
17 had occurred and, in some instances, occurred more than once. At the time of its
18 presentations, the prosecution possessed reports submitted by physicians who had
19 examined the children. None of the physicians found any indicia of sexual
20 penetration. The prosecution did not present these reports to the grand jury.

21 On appeal, the Supreme Court agreed and held that the prosecution's failure

1 to present such evidence added to an overall foundation supportive of the district
2 court's decision to dismiss the indictments. Id. The Court importantly noted that
3 *while not entirely dispositive* of whether the children were sexually assaulted,
4 “evidence that there were no physical findings of penetration would tend to explain
5 away the charges against the defendants, or, at the very least, would suggest that
6 any sexual abuse that might have occurred did not happen as recounted by some of
7 the alleged victims. The grand jury should have had this information before it in
8 order for it to make an informed determination.” Id. The Court further noted that:

12 the prosecution received statements by preschool teachers and staff.
13 These statements indicated that there were normally at least four
14 teachers or assistants supervising the children at each preschool, that
15 the shuttle buses between the preschools usually traveled in tandem,
16 and that the children were not normally out of an adult supervisor's
17 presence. None of the teachers or staff who provided statements
18 indicated that they observed any activity or heard any statements that
19 would suggest that child abuse was or had been occurring. The
20 District Attorney's Office, however, never called any of the teachers
21 or staff, the majority of whom were women and some of whom had
22 children attending the preschools, to testify before the grand jury at
23 any of its proceedings. This evidence was of an exculpatory nature
24 and the district attorney should have presented it.

19 The prosecutors also failed to present certain other evidence which
20 when considered separately may not have explained away the charges,
21 but when viewed in its totality was exculpatory, i.e., the schools' open
22 floor plans, the irregular flow of persons, including parents, in and out
23 of the schools, and the presence of a tutorial service that rented space
24 at the Hash Lane preschool. When considered against the allegations
25 of continuous and ongoing sexual abuse, some of which was alleged
26 to have occurred in open areas, *this evidence would have had a
27 tendency to explain away the charges and it should have been
28 presented.*

24 Id. (Emphasis added).

26 When a prosecutor has abused NRS 172.145(2) by withholding known
27 exculpatory evidence and engaging in conduct that impairs the function of an
28

1 independent and informed grand jury, the courts of this state have not stood
2 silently by. See State v. Babayan, 106 Nev. 155, 169-70, 787 P.2d 805, 816-17
3 (1990). See also Ostman v. Eighth Judicial Dist. Court, 816 P.2d 458, 107 Nev.
4 563 (1991) in which a statement that the Defendant gave to the police, which
5 generally acknowledged the alleged events occurred but claimed that the victim
6 voluntarily participated in the charged sexual activity, was exculpatory and
7 prosecutor was therefore obliged to present it to grand jury.
8

9
10 In the case at hand, the State could have explained away the charges because
11 Mr. Solomon's evidence established a fifth person in the car at the convenience
12 store, but Mr. Mason only saw four individuals at Mr. Valenzuela's home.
13 Moreover, the State knew that Wheeler had claimed that there were five people
14 present at the convenient store and that he had claimed to have exited the vehicle
15 before any shooting. Despite the State's interesting description before the district
16 court concerning the surveillance video of the convenience store, the video footage
17 does not reveal inside the car. Another occupant could easily have been present in
18 the car and not seen on the video surveillance.
19

20
21 Moreover, as discussed in Babayan, it does not matter that the evidence of a
22 fifth individual would not have been dispositive; that evidence was nevertheless
23 exculpatory. It could have explained away the charges as to Wheeler. If there had
24 been a fifth person present at the convenience store and Wheeler left the other four
25 individuals prior to the shooting, his involvement in the murder would have been
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1 explained away.

2 The State violated NRS 172.145(2). Here, as in Frank and Babayan, the
3 State failed to submit evidence that had “a tendency to explain away the charges
4 against the defendant,” and the State violated its duty under the clear language of
5 the statute. The Superseding Indictment must therefore be dismissed.
6

7
8 **B. INSUFFICIENT EVIDENCE SUPPORTS THE INDICTMENT**

9 There is clearly insufficient evidence against Mr. Wheeler (“Wheeler”)
10 because the evidence does not support a reasonable inference that (1) Wheeler
11 killed Gabriel Valenzuela or that (2) Wheeler conspired to rob or attempted to rob
12 Mr. Valenzuela. Due to the presentation of insufficient evidence, and in absence of
13 a *reasonable* inference based on the evidence presented, (3) probable cause does
14 not establish that Wheeler committed any of the crimes charged.
15
16

17 **1. No Reasonable Inference Wheeler Committed Murder**

18 **a. The State’s Argument**

19 Pursuant to Morgan v. Sheriff, 86 Nev. 23, 467 P2d 600 (1970) and Kinsey
20 v. Sheriff, 87 Nev. 361, 487 P.2d 340 (1971), the State previously claimed that the
21 evidence established *a reasonable inference* that Wheeler committed murder,
22 apparently, based on notions of *identity, proximity, opportunity, and exclusivity*:
23
24

25 In the lower court, the State claimed that it was only required to demonstrate
26 a *reasonable inference* that the defendant committed the crime. PA0345:18-21.
27

28 The State claimed below that a “reasonable inference” exists that the Defendant

1 was at the scene of the murder. Therefore, *arguendo*, the State suggests that
2 sufficient evidence supports the murder charge. PA0344:7-8. Such is not the case.
3

4 **b. No Reasonable Inference for Murder: No Exclusivity**

5 There is no *reasonable* inference drawn from the evidence presented to the
6 grand jury that Wheeler committed murder. Despite the alternative theories
7 advanced by the State underlying the murder count, the facts presented here do not
8 comport to the facts present in Kinsey v. Sheriff, 87 Nev. 361, 487 P.2d 340 (1971)
9 or Morgan v. Sheriff, 86 Nev. 23, 467 P.2d 600 (1970). The facts in Kinsey and
10 Morgan are far more compelling, are not analogous or fairly applied to Wheeler's
11 case, and require exclusivity, which is not present in this case. As such there is no
12 probable cause supporting the charge against Wheeler here.
13
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15

16 In Kinsey v. Sheriff, 87 Nev. 361, 487 P.2d 340 (1971), the Court found that
17 the inferences *reasonably* drawn there from the evidence constituted probable
18 cause. However, the evidence in that case was different than the evidence here.
19

20 According to the court, the evidence presented to the grand jury showed that
21 Kinsey had been:

22 a registered guest at the motel. As such he was the *sole known*
23 *occupant of the motel room*. That occupancy continued for more than
24 a month. Upon nonpayment of rent, the management locked the room.
25 The testimony shows that *no one else could have gained entrance*.
Two days after the appellant's room was locked, marijuana was found
in one of the dresser drawers inside the room.

26 Id. at 343. (Emphasis added). Thus, the fact that there was no other known
27 occupant and that *no one else could have gained entrance* justifiably and
28

1 logically led to a “reasonable inference” that appellant possessed the narcotics
2 found in his room. This is not so in the case at hand.

3
4 In Morgan v. Sheriff, 86 Nev. 23, 467 P.2d 600 (1970), this notion of
5 exclusivity or no other possible suspect similarly lead to a reasonable inference
6 that the appellant had committed the crime. In Morgan, the facts established that:

7
8 The victim testified that after her car ran out of gas on March 15,
9 1969, she began walking on Carey Street in Las Vegas. At 5:30 a.m. a
10 person grabbed her purse and took it without her consent. She had no
11 opportunity to see her assailant’s face except to note that he was a
12 male Negro. She did note that he wore a pink suit or pink pants. ***There***
13 ***were no other persons on Carey Street at that time.*** Thereafter, a
14 police car approached and the victim got into it. The police officer
15 observed appellant at approximately 5:33 a.m. in an area about 50 to
16 75 feet from the victim and he ***observed no other persons in the area.***
17 The police officer identified appellant as the person who was in the
18 area at that time. Appellant is a male Negro who was wearing a pink
19 jacket and pink pants at the time. Later, the victim’s purse was found
20 about 30 feet from where she was first seen by the police officer and
21 at a point between the victim and where appellant was first seen.

22 Id. (Emphasis added).

23 In Morgan, there was a “reasonable inference that the defendant committed
24 the crime” because (1) the victim had given a specific description of the suspect
25 beyond just race (the pink clothing), (2) Appellant had been apprehended within
26 feet (50 to 75 feet away) and mere minutes (3 minutes) of the crime, AND (3)
27 **there had been “no other individuals in the area at the time.”** Id. Such is not
28 the case here.

29 In analyzing Kinsey and Morgan, the “formula” for a “reasonable inference”
30 that the defendant committed the crime obviously requires identity, proximity,
31 opportunity AND **exclusivity**. Here, the State’s argument about the inferences

1 surmised from the evidence is NOT reasonable, and it is not analogous to the facts
2 in Kinsey or Morgan.

3
4 The State's claims here operate much more as opinion testimony¹ rather than
5 a recitation of the facts that have actually been established. In particular, Kinsey
6 and Morgan do not fit the inadequate evidence presented here because there was a
7 fifth individual present at the Shortline Express. As provided above, although the
8 State failed to present this evidence, it was certainly aware of Mr. Solomon and
9 Wheeler's statements about a fifth person. The State's entire argument supporting
10 its reasonable inference is contingent upon its suggestion that "Defendant's
11 argument as to the existence of a fifth mystery man is wholly unsupported by the
12 evidence." PA0344:22-23. Yet, the State had knowledge of evidence of the fifth
13 person but did not present this evidence.

14
15 To establish probable cause to bind a defendant over for trial, the State must
16 show that (1) a crime has been committed, and (2) there is probable cause to
17 believe the defendant committed it. See NRS 171.206. Finding of probable cause
18 requires far more than a trace of evidence; the facts must be such as would lead a
19 person of ordinary caution and prudence to believe and conscientiously entertain a
20 strong suspicion that the defendant committed the crime in question. See Graves v.

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27 ¹ See NRS 48.265 detailing the limitation to opinion testimony by lay witnesses: "If
28 the witnesses is not testifying as an expert, the witness's testimony in the *form of*
opinions or inferences is limited to those opinions or inferences which are: (1)
rationally based on the perception of the witness; and (2) helpful to a clear

1 Sheriff, 88 Nev. 436, 438, 498 P.2d 1324, 1326 (1972).

2 The State's presentation to the grand jury simply does not provide enough
3 evidence to support the charges. The facts here against Mr. Wheeler are not such as
4 would lead a person of ordinary caution and prudence to believe and
5 conscientiously entertain a strong suspicion that Mr. Wheeler committed the
6 crimes in question. See Graves v. Sheriff, 88 Nev. 436, 438, 498 P.2d 1324, 1326
7 (1972). Moreover, the State's contention, pursuant to Morgan v. Sheriff, 86 Nev.
8 23, 467 P2d 600 (1970) and Kinsey v. Sheriff, 87 Nev. 361, 487 P.2d 340 (1971),
9 that the evidence provides a reasonable inference that Defendant committed the
10 crime of Murder with Use of a Deadly Weapon (SR at 12:18-20), is not applicable
11 or analogous and has no support.
12

13 **2. No Reasonable Inference of Robbery or Attempted Robbery**

14 The State further argued in the lower court that the evidence clearly
15 demonstrated probable cause to show a coordinated series of acts sufficient to infer
16 the existence of an agreement between the defendants and to support the existence
17 of a conspiracy and attempted robbery because: (1) It is undisputed that a deadly
18 weapon was used when Mr. Valenzuela was shot and killed (RS 17:20-22); (2)
19 Defendant and his co-defendants were "lying in wait in a residential neighborhood
20 in the middle. The most reasonable explanation for this fact is that the Defendant
21

22 understanding of the testimony of the witness or the determination of a fact in
23 issue."
24

1 and his co-defendants were looking for a victim to rob;” (PA0347:22-25); (3)
2 There’s no other logical explanation for the Defendant to be standing outside the
3 victim’s home, and there is absolutely no evidence that the Defendant or any of the
4 co-defendants knew Mr. Valenzuela. (PA0347:26-28); (4) Mr. Valenzuela’s items
5 were strewn about the ground; (PA0348:3-5); (5) The Defendant and his co-
6 defendants all left the gas station together AND drove to the scene of the murder in
7 the same vehicle; (PA0348:6-7); and (6) none of the offenders were present on
8 scene when police arrived in order to explain what happened. (PA0348:9-10).
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12 In contrast to the State’s claim, there is no evidence here supporting a
13 conspiracy to rob, lying in wait, or felony murder, nor is there any evidence that
14 Mr. Wheeler aided or abetted the crime. There is no inference from the evidence
15 actually presented that Mr. Wheeler was part of any preconceived plan. There are
16 simply gaps in the evidence into which the State is creating the notion of an
17 inference but without facts to support the inference.
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20 It is undisputed that Wheeler’s weapon was not used in the shooting, and
21 there was no identification that Wheeler was at the scene of the crime. The State
22 asserts that “the most reasonable explanation” of the four individuals at the scene is
23 that the co-defendants were looking for a victim to rob. Yet, this assertion begs the
24 question, “why would they not then attempt to rob or harm Mr. Mason?” Mr.
25 Mason was jogging alone and traveled right past them. If the individuals were only
26 there to rob someone, they would have robbed him.
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1 Moreover, there are many other explanations as to why the individuals were
2 outside of the home. Unlike Kinsey and Morgan, where no one else could logically
3 or reasonably have been involved, there was a fifth individual here, which excludes
4 Mr. Wheeler based on the evidence. There are many other reasons why the four
5 individuals may have been present. However, there is no reasonable evidence that
6 Wheeler was one of the four individuals.
7

8 Additionally, although the State claimed below that Mr. Valenzuela's items
9 were strewn about the ground (thus evidencing a robbery), the "items" were the
10 mail, and there is no evidence that his property had been strewn about. There was
11 no evidence of a wallet, cell phone, watch or any other personal effects were
12 strewn, attempted to be taken, or actually missing. The State claimed that the
13 Defendant and co-defendants left the gas station together AND drove to the scene
14 of the murder in the same vehicle. However, the evidence showed that Wheeler
15 claimed to have gotten out of the car and onto a bus and was not at the murder
16 scene.
17

18 Finally, the State alluded below to flight in explaining that none of the
19 offenders were present on the scene when police arrived. However, no evidence
20 showed that Wheeler had been present at the murder scene in the first place, and
21 there are no reasonable inferences to suggest otherwise. Simply saying that "the
22 most reasonable explanation is . . ." cannot amount to "evidence." There is simply
23 no evidence or inference-supported-by-the-evidence establishing a conspiracy, a
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1 robbery or an attempt to rob, period. The Superseding Indictment possesses
2 insufficient evidence to support it, and it should therefore be dismissed.

3
4 **VII. CONCLUSION**

5 The district court acted in an arbitrary exercise of its discretion by denying
6 Mr. Wheeler's Petition for Writ of Habeas Corpus. For the reasons provided above,
7 the Defense respectfully requests this Honorable Court grant this petition for a
8 Writ of Mandamus/Prohibition and order that the district court to dismiss the
9 Superseding Indictment.
10

11
12 DATED this 13th day of September, 2018.

13 **JAMES J. RUGGEROLI**

14 By /s/ James J. Ruggeroli

15 James J. Ruggeroli, Esq.

16 Nevada Bar No. 7891

17 400 South 4th Street, Suite 280

18 Las Vegas, Nevada 89101

19 *Attorney for Petitioner*
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VERIFICATION

I hereby verify, pursuant to NRAP 21(a)(5), that Petitioner is unable to verify the petition or the facts stated herein, but the petition or facts stated within this petition are within my knowledge and I declare under penalty of perjury that the foregoing are true and corrected. NRS 53.045.

DATED this 13th day of September, 2018.

JAMES J. RUGGEROLI

By /s/ James J. Ruggeroli
James J. Ruggeroli, Esq.
Nevada Bar No. 7891
400 South 4th Street, Suite 280
Las Vegas, Nevada 89101
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28 (e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

Rules of Appellate Procedure.

DATED this 13th day of September, 2018.

JAMES J. RUGGEROLI

By /s/ James J. Ruggeroli

James J. Ruggeroli, Esq.

Nevada Bar No. 7891

601 South 7th Street

Las Vegas, Nevada 89101

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 13, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

STEVEN B. WOLFSON, Clark County District Attorney

ADAM PAUL LAXALT, Nevada Attorney General

DATED this 13th day of September, 2018.

JAMES J. RUGGEROLI

By /s/ James J. Ruggeroli

James J. Ruggeroli, Esq.

Nevada Bar No. 7891

601 South 7th Street

Las Vegas, Nevada 89101

Attorney for Petitioner